Supreme Court of the United States

OCTOBER TERM, 1942.

No. 300.

HOWARD S. PALMER, HENRY B. SAWYER and JAMES LEE LOOMIS, as Trustees for The New York, New Haven and Hartford Railroad Company,
Petitioners,

—against—

HOWARD F. HOFFMAN, individually and as Administrator of the goods, chattels and credits which were of Inez Hoffman, also known as Inez T. Spraker Hoffman, deceased,
Respondent.

PETITION FOR A REHEARING.

EDWARD R. BRUMLEY,
Counsel for Petitioners.

A. G. Kuhbach,
R. W. Pickard,
Of Counsel.

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I.

Petition for a Rehearing.

Come now the above-named petitioners, Howard S. Palmer, Henry B. Sawyer and James Lee Loomis, as Trustees for The New York, New Haven and Hartford Railroad Company, and present this, their petition for a rehearing of the above-entitled cause, and, in support thereof, respectfully show:

A. The Question Presented.

Were petitioners' exceptions to the charge and to the failure to charge sufficiently specific to bring into focus the precise nature of the alleged error?

The position of petitioners may be summarized as follows: parts of the Second and Fourth Causes of Action alone involve the defense of contributory negligence; the exception to the charge on burden of proof of contributory negligence is expressly connected with Request No. 16 and the two together point solely to the personal injury claim based on the common law, part of the Second Cause of Action; the trial court, in charging on burden of proof of contributory negligence and on contributory negligence, referred to contributory negligence as a defense at common law; petitioners, in several requests to charge, distinguished between contributory negligence at common law and statutory violation, and pointed out that contributory negligence was a defense at common law; petitioners' motion to dismiss and for a directed verdict likewise made clear that contributory negligence was a defense at common law.

Petitioners respectfully submit that their exceptions to the charge in respect of burden of proof of contributory negligence and to the failure to charge Request No. 16 refer only to the common law basis of the Second Cause of Action, and that both exceptions were "sufficiently specific to bring into focus the precise nature of the alleged error" (quotation from the opinion of Mr. Justice Douglas).

B. The Record.

(1) The complaint.

The First Cause of Action, on behalf of Howard F. Hoffman, is founded on a signal statute. It sets out (R. 5, paragraph Tenth of Complaint) Section 138 of Chapter 160, General Laws of Massachusetts (1932), which requires a railroad to ring a bell or blow a whistle upon approaching a grade crossing. It alleges (R. 6,

paragraph Fourteenth of Complaint) a violation of this Section by petitioners, and that the accident occurred solely through such violation (R. 6, paragraph Fifteenth of Complaint).

The First Cause of Action sets out (R. 5, 6, paragraph Twelfth of Complaint) Section 15 of Chapter 90, General Laws of Massachusetts (1932), which requires every person operating a motor vehicle, upon approaching a railroad crossing at grade, to reduce speed of the vehicle to a reasonable and proper rate and to proceed cautiously over the crossing. The Complaint alleges that respondent complied with this section (R. 6, paragraph Fifteenth of Complaint). Violation of this Section is one of the defenses to the statutory right of action.

The signal statute must be read in connection with Section 232 of Chapter 160, referred to in the opinion of Mr. Justice Douglas and pleaded by petitioners (R. 23). If a person is injured by a railroad's violation of Section 138 he may recover "unless it is shown that, in addition to a mere want of ordinary care, the person injured * * * was * * * guilty of gross or wilful negligence, or was acting in violation of the law * * * *".

The Second Cause of Action alleges (R. 7-9) that the accident occurred solely through a violation of Section 138, Chapter 160 (it realleges paragraph Fifteenth), and through the common law negligence of petitioners. The First Cause of Action is brought under a statute, the Second, under the same statute and at common law. While the intended basis of the latter was probably the common law, because of respondent's pleading neither the trial court nor petitioners could refer to it as wholly and solely a common law cause of action. Both the trial court and petitioners had to rely upon the distinction between contributory negligence at common law and violation of the statute.

The Third Cause of Action, in connection with the death case, repeats (R. 9, paragraph Twenty-second of Complaint) the references to Section 138 of Chapter 160, Section 15 of Chapter 90, and Section 140 of Chapter 160, of the General Laws of Massachusetts. It alleges that the accident occurred solely through violation of Section 138, Chapter 160. It also sets out (R. 10, paragraph Twenty-eight of Complaint), Section 3 of Chapter 229 which gives a right of recovery for death, the damages to be measured by "the degree of culpability".

The Fourth Cause of Action, also in connection with the death case, alleges (R. 11, paragraph Thirty-first of Complaint) that the accident occurred solely through the violation by petitioners of Section 138, Chapter 160, and through the common law negligence of petitioners, and refers to Section 3 of Chapter 229 giving a right of recovery for death.

(2) The exception to the charge on burden of proof of contributory negligence and the exception to the refusal to charge Request No. 16.

Analysis of the complaint makes clear the limited application of the above exceptions. They applied only to that part of the Second Cause of Action which recites common law negligence.

The Record shows (R. 394, 395):

"Mr. Brumley: I respectfully except to your Honor's charge in respect of burden of proof on contributory negligence.

"The Court: Yes; I will give you an exception.

"Mr. Brumley: I point that out in connection with our Request No. 16.

"The Court: Yes; and I did not pass upon the request, because I felt that you ought to take an

exception in the charge on that; do you see? You have it, at any rate.

"Mr. Brumley: We except to the charge, and we except to the failure to charge, and we except to the failure to charge in respect of request No. 16.

"Mr. Allen: Will you give me the whole request, please?

"The Court: Wait a minute. I will give it to you so that you will not have any trouble:

"'In the personal injury action, plaintiff has the burden of proving freedom from contributory negligence.'

"That I refuse to charge, and give the defendant an exception."

This clearly points to the personal injury claim based on the common law—part of the Second Cause of Action.

(3) The charge on burden of proof of contributory negligence.

The charge on burden of proof of contributory negligence reads (R. 387):

"'In all actions of a civil nature to recover damages for the injuries to the person or property or for causing the death of a person, the person injured or killed shall be presumed to have been in the exercise of due care, and contributory negligence on his part shall be an affirmative defense to be set up in the answer and proved by the defendant.'

"That means, gentlemen, that the defendant has the burden, as I have just told you, of proving the contributory negligence. The definition of that burden is exactly like the one I just gave you as to the contributory negligence.

> "After you have taken up this question of contributory negligence, if the scales are evenly balanced, the defendant has not sustained the burden; but if the defendant's testimony on contributory negligence weighs a little bit more than the other side's, then, of course, the defendant has sustained the burden of contributory negligence."

This part of the charge necessarily refers only to contributory negligence at common law because contributory negligence is not a defense to an action under the signal statute. The exceptions to the charge and to the failure to charge Request No. 16, noted by petitioners, objected to the charge on burden of proof in the personal injury action. All this points unerringly to that part of the Second Cause of Action which recites common law negligence.

(4) Other requests to charge.

Other requests to charge distinguished between the common law and the Massachusetts statutes, between contributory negligence and violation of law.

The trial court charged petitioners' Request No. 1 (R. 387, 395, 400), which reads:

> "Section 15 of Chapter 90 requires active diligence by a motor vehicle operator, and its command is not couched in terms of due care and diligence."

Petitioners made the distinction to the trial court in their Request No. 5 (R. 401), which reads:

> "In counts based upon the common law, a finding of ordinary negligence on the part of plaintiffs will defeat recovery. In counts based upon General Laws, c. 160, §232, charging defendants with failure to give

signals required by §138, the plaintiffs would have no right to recovery if found to be grossly or wilfully negligent, or guilty of some violation of law."

The trial court charged petitioners' Request No. 6 (R. 389, 395, 401), which reads:

"If there was a violation of a penal statute as a contributing cause, recovery is barred at common law as well as under the grade crossing statute, and a violation of §15 of c. 90 is a violation of a penal statute."

The trial court adopted the view that violation of a penal statute would bar recovery both under the signal statute and at common law, whereas contributory negligence would bar recovery only at common law.

Petitioners' Request No. 11 (R. 402) reads:

"If plaintiff-operator violated §15 of c. 90 there can be no recovery for the death of his wife under §232, c. 160, and §3 of c. 229."

(5) Other parts of the charge.

Other parts of the charge distinguish between the common law and the Massachusetts statutes, between contributory negligence and violation of law. Not only did petitioners differentiate in their exceptions to the charge and in the requests to charge, but the trial court had clearly in mind "the precise nature of the alleged error".

The court charged (R. 388):

"I charged you about the law, which is aside from the statutory law, and that is what we call the common law. There are two sets of laws that I have charged you—and keep in mind that one is statutory;

meaning that which I have read to you as the statutes, and the other one is the common law—that which I have charged you aside from the statutes. In basing your analysis of the testimony under the common law, a finding of ordinary negligence on the part of the plaintiff will defeat recovery."

The trial court expressly said that under the common law a finding of ordinary negligence on the part of the plaintiff would defeat recovery (R. 388). The trial court also charged that contributory negligence would defeat the personal injury and the death cases (R. 387, 388, 394). It is clear that the reference is to contributory negligence at common law, otherwise the charge would completely disregard the effect of the statutory defenses to the claims based upon the statute, concerning which the court charged (R. 389, 393).

(6) Petitioners' motion to dismiss and motion for directed verdict.

Petitioners' motion to dismiss the Complaint (R. 224, 225), and their motion for a directed verdict (R. 382), specifically called to the attention of the trial court that contributory negligence was a defense to any claim at common law.

C. Conclusions.

Contributory negligence is the counterpart of negligence. The Record shows that the term had a clear, definite meaning and application for the trial court and the parties, in spite of the stress of the trial and the several Massachusetts statutes involved. The cases of *Manley* v. *Boston & Maine R.*, 159 Mass. 493 (1893); *Phelps* v. *New England R. Co.*, 172 Mass. 98 (1898); *McDonald* v. *New York C. & H. R. Co.*, 186 Mass. 474 (1904); and *Kenny* v. *Boston & Maine R.*, 188 Mass. 127 (1905), held that the

burden of proving gross or wilful negligence, or violation of the statute (not "the burden of proving contributory negligence") was on the defendant.

In *Morel* v. *New York, New Haven & H. R. R.*, 238 Mass. 392 (1921), the ground for recovery was failure to give the statutory signals under a statute of 1906, now Section 232, Chapter 160. The opinion reads in part (p. 395):

> "The so called due care statute, to which reference is made in the request, has no application to actions for injuries caused by failure to give the statutory signals required from those in charge of locomotives at grade crossings."

The due care statute referred to was that of 1914, now Section 85 of Chapter 231. That Section, while in terms applicable to all actions to recover damages for injuries or for death, is not applicable when an action is based on liability for damages in case of collision at grade crossings under Section 232, Chapter 160.

Late grade crossing cases in Massachusetts have also made the same distinction: *Fortune* v. *New York, N. H. & Hartford R. R.*, 271 Mass. 101 (1930); *Klegerman* v. *New York, N. H. & Hartford R. R.*, 290 Mass. 268 (1935); *Lincoln* v. *New York, N. H. & Hartford R. R.*, 291 Mass. 116 (1935); and *Coppithorn* v. *Boston & Maine Railroad*, 309 Mass. 363 (1941). Contributory negligence is treated as one idea, violation of the statute as quite another and different idea.

As petitioners read the opinion, if their exception to the charge on contributory negligence, and their exception to the refusal to charge Request No. 16, had expressly referred to "common law", the decree would have been reversed. To have written in "common law" in the

request, or to have spelt it out in the exception to the charge, would have been mere surplusage.

Respondent admits (Respondent's Brief, pp. 27, 28) that the trial court charged that under counts based upon the common law, ordinary negligence would defeat the respondent, and in counts based upon the statute, gross or wilful negligence or violation of law would defeat the respondent. As the First Cause of Action is statutory the reference to contributory negligence in Request No. 16 could not relate to it, but only to the common law part of the Second Cause of Action, where it would be of any avail, as explained by Request No. 5. It was hardly necessary for petitioners to submit Request No. 16 and advise the court at the same time that it was not intended to apply to an action based upon a statute, especially as it did not so apply under Massachusetts law or in the mind of the court. Contributory negligence was as foreign to the First Cause of Action as it would be to an action for breach of contract. Petitioners, not respondent, pleaded Section 232, Chapter 160, and properly eliminated contributory negligence as a defense to the statutory actions.

If petitioners adequately presented the question of burden of proof of contributory negligence in the personal injury claim based on the common law, then the court below should consider it solely from the New York law point of view. This petition has a larger significance than the interests of the parties—the effect of the characterization of a long established common law idea, and a judgment consistent with such characterization.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted and that the decree of the Circuit Court of Appeals for the Second Circuit be, upon further consideration, reversed and the case remanded to the court below to examine and make an appropriate application of the New York law on the common law basis of the judgment in favor of Howard F. Hoffman, individually.

Respectfully submitted,

EDWARD R. BRUMLEY,
Counsel for Petitioners.

A. G. Kurbach,
R. W. Pickard,
Of Counsel.

II.

Certificate of Counsel.

The undersigned, Edward R. Brumley, counsel for the petitioners, Howard S. Palmer, Henry B. Sawyer and James Lee Loomis, as Trustees for The New York, New Haven and Hartford Railroad Company, hereby certifies that the foregoing petition for rehearing is filed in good faith; that he believes same to be meritorious; and that said petition for rehearing is not filed for the purpose of delay.

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SUPREME COURT OF THE UNITED STATES.

No. 300.—October Term, 1942.

Howard S. Palmer, Henry B. Sawyer and James Lee Loomis, as Trustees for the New York, New Haven and Hartford Railroad Company, Petitioners,
vs.
Howard F. Hoffman, Individually and as Administrator of the Goods, Chattels and Credits which were of Inez Hoffman, Also Known as Inez T. Spraker Hoffman, Deceased.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 1, 1943.]

Mr. Justice Douglas delivered the opinion of the Court.

This case arose out of a grade crossing accident which occurred in Massachusetts. Diversity of citizenship brought it to the federal District Court in New York. There were several causes of action. The first two were on behalf of respondent individually, one being brought under a Massachusetts statute (Mass. Gen. L. (1932) c. 160 §§ 138, 232), the other at common law. The third and fourth were brought by respondent as administrator of the estate of his wife and alleged the same common law and statutory negligence as the first two counts. On the question of negligence the trial court submitted three issues to the jury—failure to ring a bell, to blow a whistle, to have a light burning in the front of the train. The jury returned a verdict in favor of respondent individually for some $25,000 and in favor of respondent as administrator for $9,000. The District Court entered judgment on the verdict. The Circuit Court of Appeals affirmed, one judge dissenting. 129 F. 2d 976. The case is here on a petition for a writ of certiorari which presents three points.

I. The accident occurred on the night of December 25, 1940. On December 27, 1940, the engineer of the train, who died before the trial, made a statement at a freight office of petitioners where he was interviewed by an assistant superintendent of the road and by a representative of the Massachusetts Public Utilities Com-

mission. See Mass. Gen. L. (1932) c. 159, § 29. This statement was offered in evidence by petitioners under the Act of June 20, 1936, 49 Stat. 1561, 28 U. S. C. § 695.[1] They offered to prove (in the language of the Act) that the statement was signed in the regular course of business, it being the regular course of such business to make such a statement. Respondent's objection to its introduction was sustained.

We agree with the majority view below that it was properly excluded.

We may assume that if the statement was made "in the regular course" of business, it would satisfy the other provisions of the Act. But we do not think that it was made "in the regular course" of business within the meaning of the Act. The business of the petitioners is the railroad business. That business like other enterprises entails the keeping of numerous books and records essential to its conduct or useful in its efficient operation. Though such books and records were considered reliable and trustworthy for major decisions in the industrial and business world, their use in litigation was greatly circumscribed or hedged about by the hearsay rule—restrictions which greatly increased the time and cost of making the proof where those who made the records were numerous.[2] 5 Wigmore, Evidence (3d ed., 1940) § 1530. It was that problem which started the movement towards adoption of

[1] "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term 'business' shall include business, profession, occupation, and calling of every kind."

[2] The problem was well stated by Judge Learned Hand in Massachusetts Bonding & Ins. Co. v. Norwich Pharmacal Co., 18 F. 2d 934, 937: "The routine of modern affairs, mercantile, financial and industrial, is conducted with so extreme a division of labor that the transactions cannot be proved at first hand without the concurrence of persons, each of whom can contribute no more than a slight part, and that part not dependent on his memory of the event. Records, and records alone, are their adequate repository, and are in practice accepted as accurate upon the faith of the routine itself, and of the self-consistency of their contents. Unless they can be used in court without the task of calling those who at all stages had a part in the transactions recorded, nobody need ever pay a debt, if only his creditor does a large enough business."

legislation embodying the principles of the present Act. See Morgan et al., The Law of Evidence, Some Proposals for its Reform (1927) c. V. And the legislative history of the Act indicates the same purpose.[3]

The engineer's statement which was held inadmissible in this case falls into quite a different category.[4] It is not a record made for the systematic conduct of the business as a business. An accident report may affect that business in the sense that it affords information on which the management may act. It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls. The conduct of a business commonly entails the payment of tort claims incurred by the negligence of its employees. But the fact that a company makes a business out of recording its employees' versions of their accidents does not put those statements in the class of records made "in the regular course" of the business within the meaning of the Act. If it did, then any law office in the land could follow the same course, since business as defined in the Act includes the professions. We would then have a real perversion of a rule designed to facilitate admission of records which experience has shown to be quite trustworthy. Any business by installing a regular system for recording and preserving its version of accidents for which it was potentially liable could qualify those reports under the Act. The result would be that the Act would cover any system of recording events or occurrences provided it was "regular" and though it had little or nothing to do with the management or operation of the business as such. Preparation of cases for trial by virtue of being a "business" or incidental thereto would obtain the benefits of this liberalized version

[3] Thus the report of the Senate Committee on the Judiciary incorporates the recommendation of the Attorney General who stated in support of the legislation, "The old common-law rule requires that every book entry be identified by the person making it. This is exceedingly difficult, if not impossible, in the case of an institution employing a large bookkeeping staff, particularly when the entries are made by machine. In a recent criminal case the Government was prevented from making out a prima-facie case by a ruling that entries in the books of a bank, made in the regular course of business, were not admissible in evidence unless the specific bookkeeper who made the entry could identify it. Since the bank employed 18 bookkeepers, and the entries were made by bookkeeping machines, this was impossible." S. Rep. No. 1965, 74th Cong., 2d Sess., pp. 1-2.

[4] It is clear that it does not come within the exceptions as to declarations by a deceased witness. See Shepard v. United States, 290 U. S. 96; Wigmore, *supra*, chs. XLIX-LIV.

of the early shop book rule. The probability of trustworthiness of records because they were routine reflections of the day to day operations of a business would be forgotten as the basis of the rule. See *Conner* v. *Seattle, R. & S. Ry. Co.*, 56 Wash. 310, 312-313. Regularity of preparation would become the test rather than the character of the records and their earmarks of reliability (*Chesapeake & Delaware Canal Co.* v. *United States*, 250 U. S. 123, 128-129) acquired from their source and origin and the nature of their compilation. We cannot so completely empty the words of the Act of their historic meaning. If the Act is to be extended to apply not only to a "regular course" of a business but also to any "regular course" of conduct which may have some relationship to business, Congress not this Court must extend it. Such a major change which opens wide the door to avoidance of cross-examination should not be left to implication. Nor is it any answer to say that Congress has provided in the Act that the various circumstances of the making of the record should affect its weight not its admissibility. That provision comes into play only in case the other requirements of the Act are met.

In short, it is manifest that in this case those reports are not for the systematic conduct of the enterprise as a railroad business. Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like these reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading.

It is, of course, not for us to take these reports out of the Act if Congress has put them in. But there is nothing in the background of the law on which this Act was built or in its legislative history which suggests for a moment that the business of preparing cases for trial should be included. In this connection it should be noted that the Act of May 6, 1910, 36 Stat. 350, 45 U. S. C. § 38, requires officers of common carriers by rail to make under oath monthly reports of railroad accidents to the Interstate Commerce Commission, setting forth the nature and causes of the accidents and the circumstances connected therewith. And the same Act (45 U. S. C. § 40) gives the Commission authority to investigate and to make reports upon such accidents. It is provided, however, that "Neither the report required by section 38 of this title nor any report of the investigation provided for in section 40 of this title nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for

damages growing out of any matter mentioned in said report or investigation." 45 U. S. C. § 41. A similar provision (36 Stat. 916, 54 Stat. 148, 45 U. S. C. § 33) bars the use in litigation of reports concerning accidents resulting from the failure of a locomotive boiler or its appurtenances. 45 U. S. C. §§ 32, 33. That legislation reveals an explicit Congressional policy to rule out reports of accidents which certainly have as great a claim to objectivity as the statement sought to be admitted in the present case. We can hardly suppose that Congress modified or qualified by implication these long standing statutes when it permitted records made "in the regular course" of business to be introduced. Nor can we assume that Congress having expressly prohibited the use of the company's reports on its accidents impliedly altered that policy when it came to reports by its employees to their superiors. The inference is wholly the other way.

The several hundred years of history behind the Act (Wigmore, *supra*, §§ 1517-1520) indicate the nature of the reforms which it was designed to effect. It should of course be liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed. But "regular course" of business must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business.

II. One of respondent's witnesses testified on cross-examination that he had given a signed statement to one of respondent's lawyers. Counsel for petitioners asked to see it. The court ruled that if he called for and inspected the document, the door would be opened for respondent to offer the statement in evidence, in which case the court would admit it. See *Edison Electric Light Co.* v. *U. S. Electric Lighting Co.*, 45 Fed. 55, 59. Counsel for petitioners declined to inspect the statement and took an exception. Petitioners contend that that ruling was reversible error in light of Rule 26(b) and Rule 34 of the Rules of Civil Procedure. We do not reach that question. Since the document was not marked for identification and is not a part of the record, we do not know what its contents are. It is therefore impossible, as stated by the court below, to determine whether the statement contained remarks which might serve to impeach the witness. Accordingly, we cannot say that the ruling was prejudicial even if we assume it was erroneous. Mere "technical errors" which do not "affect

the substantial rights of the parties" are not sufficient to set aside a jury verdict in an appellate court. 40 Stat. 1181, 28 U. S. C. § 391. He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted. That burden has not been maintained by petitioners.

III. The final question presented by this case relates to the burden of proving contributory negligence. As we have noted, two of the causes of action were based on the common law and two on a Massachusetts statute. The court without distinguishing between them charged that petitioners had the burden of proving contributory negligence. To this petitioners excepted, likewise without distinguishing between the different causes of action. And again without making any such distinction, petitioners requested the court to charge that the burden was on respondent. This was refused and an exception noted.

Respondent contends in the first place that the charge was correct because of the fact that Rule 8(c) of the Rules of Civil Procedure makes contributory negligence an affirmative defense. We do not agree. Rule 8(c) covers only the manner of pleading. The question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases (*Erie R. Co.* v. *Tompkins*, 304 U. S. 64) must apply. *Cities Service Co.* v. *Dunlap*, 308 U. S. 208; *Sampson* v. *Channel*, 110 F. 2d 754. And see *Central Vermont Ry. Co.* v. *White*, 238 U. S. 507, 512.

Secondly, respondent contends that the courts below applied the rule of conflict of laws which obtains in New York. So far as the causes of action based on the Massachusetts statute are concerned, we will not disturb the holding below that as a matter of New York conflict of laws, which the trial court was bound to apply (*Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487) petitioners had the burden of proving contributory negligence. That ruling was based on *Fitzpatrick* v. *International Ry. Co.*, 252 N. Y. 127, which involved an action brought in New York under a statute of the Province of Ontario. That statute gave a plaintiff in a negligence action, though guilty of contributory negligence, a recovery if the defendant was more negligent, the damages being proportioned to the degree of fault imputable to the defendant. The New York Court of Appeals held that the New York courts were justified in applying the Ontario rule, growing out of the

statute, that the burden was on the defendant to show contributory negligence. The Massachusetts statute on which two of the present causes of action were founded makes a railroad corporation liable for its neglect in giving certain signals. It provides that tort damages for injuries or death from collisions at crossings may be recovered where such neglect "contributed" to the injury, "unless it is shown that, in addition to a mere want of ordinary care, the person injured . . . was, at the time of the collision, guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross or wilful negligence or unlawful act contributed to the injury." Mass. Gen. L. (1932) c. 160, § 232. That statute, like the Ontario statute, creates rights not recognized at common law. *Brooks* v. *Fitchburg & L. St. Ry.*, 200 Mass. 8; *Duggan* v. *Bay State Street Ry. Co.*, 230 Mass. 370, 381-382; *Sullivan* v. *Hustis*, 237 Mass. 441, 446; *Lewis* v. *Boston & Maine R.*, 263 Mass. 87, 91. And in actions under it the burden of proving contributory negligence is on the defendant. *Manley* v. *Boston & Maine R.*, 159 Mass. 493; *Phelps* v. *New England R. Co.*, 172 Mass. 98; *McDonald* v. *New York C. & H. R. Co.*, 186 Mass. 474; *Kenny* v. *Boston & Maine R.*, 188 Mass. 127. And see Mass. Gen. L. (1932) c. 231, § 85. Moreover, the measure of damages for death is "the sum of not less than five hundred nor more than ten thousand dollars, to be assessed with reference to the degree of culpability of the" railroad. Mass. Gen. L. (1932) c. 229, § 3. We are referred to no New York decision involving the point. The propriety of applying the rule of the *Fitzpatrick* case to the causes of action based on the Massachusetts statute may be arguable. But it is not the type of ruling under *Erie R. Co.* v. *Tompkins*, *supra*, which we will readily disturb. Where the lower federal courts are applying local law, we will not set aside their ruling except on a plain showing of error.

The question which is raised on the common law counts is more serious. The court below did not distinguish between the conflict of laws rule in a case like the *Fitzpatrick* case and the rule which apparently obtains in cases where the foreign cause of action is not founded on such a statute. It was intimated in the *Fitzpatrick* case (252 N. Y. p. 135) and stated in other cases in New York's intermediate appellate courts (*Wright* v. *Palmison*, 237 A. D. 22; *Clark* v. *Harnischfeger Sales Corp.*, 238 A. D. 493, 495) that in the latter situation the burden of proving freedom

from contributory negligence is on the plaintiff. *Fitzpatrick* v. *International Ry. Co., supra,* p. 134. But we do not reverse and remand the case to the court below so that it may examine and make an appropriate application of the New York law on the common-law counts, for the following reason: As we have noted, petitioners in their exceptions to the charge given and in the requested charge did not differentiate between the causes of action based on the Massachusetts statute and those on the common law. Even if we assume that the charge on the latter was erroneous, we cannot say that the charge was incorrect so far as the statutory causes of action were concerned. Likewise we must assume that it would have been error to give the requested charge on the statutory causes of action even though we accept it as the correct charge on the others. Under these facts a general exception is not sufficient. In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial. See *Lincoln* v. *Claflin*, 7 Wall. 132, 139; *Beaver* v. *Taylor*, 93 U. S. 46, 54-55; *Mobile & M. Ry. Co.* v. *Jurey*, 111 U. S. 584, 596; *McDermott* v. *Severe*, 202 U. S. 600, 611; *Norfolk & W. Ry. Co.* v. *Earnest*, 229 U. S. 114, 122; *Pennsylvania R. Co.* v. *Minds*, 250 U. S. 368, 375. That long standing rule of federal practice is as applicable in this type of case as in others. That rule cannot be avoided here by reason of the requested charge. For, as we have said, it was at most only partially correct and was not sufficiently discriminating.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.